United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with Affidavit of Mailing

75-1211

B P/S

To be argued by
KENNETH J. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1211

UNITED STATES OF AMERICA,

Appellee,

—against—

SAMUEL KAPLAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Samuel Kaplan appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Judd, *J.*) entered May 23, 1975, which judgment convicted appellant, after a jury trial, of knowingly distributing 25.6 grams of heroin (count two), in violation of 21 U.S.C. § 841(a)(1).[1] Appellant was sentenced to a term of imprisonment of eight years and a special parole term of ten years pursuant to 18 U.S.C. § 4208(a)(2). Appellant is free on bail pending this appeal.

Appellant was originally tried before Judge Weinstein and a jury in February, 1974, and was convicted on both counts of the indictment. This court subsequently reversed

[1] Appellant was found not guilty as to count one of the two count indictment which charged him with knowingly possessing, with intent to distribute the heroin.

the conviction in *United States* v. *Kaplan*, 510 F.2d 606 (2d Cir. 1974) and denied a petition for rehearing brought by the United States.

On the appeal, appellant does not challenge the sufficiency of the evidence but claims that: (1) the trial court erred in admitting a co-conspirator's hearsay declarations; and (2) the trial court committed error in refusing to allow in evidence certain hearsay declarations of a defense witness.

Statement of Facts

A. The Government's Case

While operating as an undercover agent with the Bureau of Narcotics and Dangerous Drugs (now known as the Drug Enforcement Administration), Nicholas Alleva met with an individual known as Frank Lange [2] during November and December of 1971. During that period of time Alleva met and discussed narcotics with Lange on about four separate occasions. On one occasion, he purchased an ounce of heroin from Lange (A. 23-25).[3]

On January 5, 1972, Alleva had a telephone conversation with Lange. During the course of the conversation Alleva complained of the poor quality of the narcotics that he had previously purchased from Lange and inquired about the quality of the next purchase. Lange represented that the quality would be "much better" (A. 26-27). Lange further advised Alleva that the agent should come to his house the following day with "another $1,300", and at that time "his connection" would be present (A. 27).

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[2] Lange was originally named as a co-defendant with appellant, but died prior to trial. Therefore, the first indictment (72 Cr. 31) was superseded by another indictment which names appellant alone and upon which appellant was convicted.

[3] Numbers in parenthesis, preceded by the letter "A" refer to pages in the Appendix herein. Numbers preceded by "T" refer to pages of trial transcript.

At approximately 2:00 P.M. on January 6th, Alleva arrived at Lange's residence, 1923 Homecrest Avenue, Brooklyn (A. 27-28).[4] Lange greeted Alleva on the stairway and directed the agent to come upstairs to his bedroom (A. 29). Alleva entered a room with a few pieces of furniture, a mattress on the floor, posters and psychedelic lighting, and observed appellant who was wearing a white tee shirt and dungarees, half sitting and half lying on the mattress (A. 29-31). Alleva was not introduced to appellant (A. 31). Lange walked over to a night table and removed from the drawer a plastic bag containing what laboratory analysis later showed to be 25.6 grams of heroin (A. 31, 41).

At this time, Alleva looked at both appellant and Lange and stated: "Either one of you or both of you are going to have to go down with me to get the money" (A. 32). Without responding, Lange turned to appellant. Appellant, in turn, inquired of Alleva: "Why do we have to go down and get the money" (A. 33). Alleva responded: "You guys beat me once, you're not going to do it again".[5] Once more Lange turned to appellant. Appellant then motioned to Lange and said: "All right, go with him." Lange then proceeded to move (A. 33-34). Before Alleva exited the room with Lange, however, he asked appellant about the quality of the heroin he had just purchased. Appellant stated: "It's five hit stuff, I hit it five times myself" (A. 34-35).

Alleva and Lange exited the room and proceeded to the Government car where the money, $1300, was located. After Alleva field tested the narcotics, he placed the package in the center console of the car and went outside to

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[4] Lange lived with his parents and sister in a one family house. He occupied a second floor bedroom (A. 29).

[5] According to Agent Alleva, the term "beat" within the context of this conversation refers to the sale of a poor quality heroin (A. 36-37).

open the trunk. At that point, Alleva's fellow agents effected the arrest of Lange (A. 38-40).

Some few minutes after the arrest of Lange, appellant was observed by surveillance Agent Lawrence Burnstein exiting the Lange residence and proceeding across the street to his vehicle (T. 85-86). Appellant appeared to be watching the activity of the agents a few houses removed from the Lange residence. Thereafter, when appellant started to walk away towards his car, he was arrested (T. 84-86).

B. The Defense

Mrs. Patricia Ruggiero, Frank Lange's sister, testified that she knew appellant for some six years. She stated that her brother and appellant worked together as carpet installers, but that her brother was unemployed during January, 1972. According to the witness, appellant often visited the family's house and was considered a family friend (A. 88-90). The witness stated that on the day in question appellant came to the Lange residence and offered to aid Frank in obtaining employment (A. 91).

Sometime later, according to the witness a young couple of some twenty-four years of age entered the house and were guided upstairs. Shortly thereafter, her brother requested if "[the couple] could sit in my room while Sammy made the phone call for my brother" (A. 93-95). The witness explained that her brother told her that the phone call by appellant was for the purpose of obtaining a job for Lange.

A short time thereafter, Alleva entered the house, and remained in the bedroom with appellant and her brother (A. 98, A. 110), She observed her brother and Alleva leaving the house together. The witness related that the young couple departed through the back exit some time thereafter (A. 98-99).

Mrs. Ruggiero described her brother as a man in his early twenties with long hair and appellant as a man in his forties (A. 102-102). She did not know the nature of appellant's employment during this time (A. 106-107). She further stated that she knew her brother was a narcotics user (A. 108).

Anthony Mandano was called by the defense and testified that his house was three houses removed from the Lange residence on Homecrest Avenue. He stated that some agents came to his house by mistake on the date in question (T. 116-117).

Tobias Gold testified that he was in the carpet business and had known appellant for twenty years (A. 116). He stated that appellant inquired about employment for Lange in December, 1971. He also received a phone call from appellant on his answering machine and later returned the call. He was advised by appellant: "Forget about it. I was going to ask you to give this Lange fellow a job again, but he got arrested today (A. 117).

Appellant did not testify in his own behalf.

ARGUMENT

POINT I

The Trial Court Properly Admitted Lange's Declarations To Agent Alleva As Statements Made In The Course Of And Furtherance Of The Conspiracy.

Appellant contends that the trial court erroneously permitted the Government, over his objection, to introduce into evidence the January 5, 1972 telephone conversation between Agent Alleva and Lange.[6] Appellant urges that

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[6] "Q. Directing your attention to January 1972, do you recall a telephone conversation which you had with Mr. Lange? A. Yes, I did.

[Footnote continued on following page]

Judge Judd was precluded from admitting this evidence in light of this Court's decision in the first appeal.

In our view, a reading of the opinion in *Kaplan I*, including the denial of the petition for rehearing leads, if anything, to the opposite conclusion, i.e., that the January 5th hearsay conversation would be properly admissible as a statement of a co-conspirator in the course of and in furtherance of a conspiracy.

In the first trial, Judge Weinstein admitted the hearsay statements under the theory that these statements were necessary to explain both Alleva's and Lange's states of mind. Judge Weinstein proceeded to provide the jury with limiting instructions on the issue of state of mind. This Court, in *Kaplan I*, stated that it was "not possible as a practical matter to imagine the jury's having isolated Alleva's state of mind as a subject of interest separate from the genuinely ultimate issue as to appellant's activities" *United States* v. *Kaplan*, *supra*, 510 F.2d at 610. Thus, the instructions were deemed ineffective and perhaps confusing to the jury in determining the guilt or innocence of the defendant.

The Court left no doubt that the "co-conspirator exception would have been a simpler ground to adopt and ad-

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Q. On what date? A. On January 5.

Q. Can you tell us who made the phone call? A. I called Lange.

Q. Where did you call him? A. At his residence.

Q. What did you say to him and what did he say to you? A. It was an extension of our discussion as to the quality. I told him I was completely dissatisfied with the previous purchase and that I wanted a better quality on the next purchase. Lange told me that this would be done as his connection would be at his house tomorrow at two p.m. and that I should go there with another $1300 and I could get an ounce of heroin which would be much better quality.

Q. What did you say? A. I agreed" (19-20).

minister that the one to which [the trial] court carefully limited itself," 510 F.2d at 612, and "[the trial court] would have been sustained had [it] allowed the hearsay to come in under the co-conspirator exception" 510 F.2d at 611. However, since no appropriate findings were made under the co-conspirator exception this Court refused to retrospectively apply this theory of admissibility to sustain the conviction. 510 F.2d at 612.

Appellant's reliance on one statement in this Court's opinion is misplaced.[7] It is noteworthy that this sentence is in the first paragraph of the discussion of the state of mind theory, which the Court rejects *ab initio*. As the opinion evolves, the issue of the co-conspirator exception is confronted. The Court discusses at length the viability of this theory as applied to the instant case and proceeds to cite extensive authority for the proposition that the co-conspirator exception if applied "would have been highly likely to stand on appeal." 510 F.2d at 612.[8]

This Court's opinion in denying the Government's petition for rehearing in *Kaplan I* further supports the view that the Court perceived the co-conspirator exception as applicable. The Government's petition for rehearing urged that the conviction could be affirmed because the proffered evidence could be admitted on a ground (the co-conspirator rule) other than that which the Court deemed erroneous. The Court, in rejecting the Government's contention, stated that unlike *United States* v. *Rosenstein*, 474 F.2d 705 (2d Cir. 1973) the purpose for which this evidence was offered

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[7] "In all the circumstances, therefore, appellant is entitled to a new trial at which this hearsay will be excluded" 510 F.2d at 610.

[8] In the course of legal argument prior to the second trial Judge Judd, in rejecting defendant's contention that the opinion precluded admissibility of the hearsay, reasoned:

> ". . . if that was the ruling for the second trial they would have stopped the opinion there. Then they go on to say why it might be admitted on a different theory (P. 16A of April 28, 1975 transcript).

was different, there was a failure by the trial court to make a finding of admissibility, and the non-hearsay evidence was not as compelling as in *Rosenstein*. The Court, by distinguishing *Rosenstein*, clearly indicated that the co-conspirator rule was a viable theory for the trial court to admit the hearsay. Instead of rejecting the possibility of admitting the hearsay *ab initio*, the Court, in its opinion, assumed the propriety of the co-conspirator rule as it might have been applied.[9]

The District Court's finding that Lange's January 5th statements to Alleva was in the course of and in furtherance of the Kaplan-Lange conspiracy is strongly supported by the testimony concerning the January 6th meeting. As Judge Judd stated, the January 6th meeting, which was described by Agent Alleva, "was sufficiently indicative of a prior understanding between Mr. Lange and Mr. Kaplan."[10]

Accordingly, when Alleva entered Lange's room on January 6th there were no introductions between appellant Kaplan and Alleva, yet Lange gives heroin in a plastic bag to the agent, in appellant's presence, and conversations concerning the narcotics take place. Thus, the inference is invited that Kaplan and Alleva knew the identity of each other based upon prior conversations with Lange. Since Alleva had been complaining about the quality of the previous heroin, it is properly inferred that it was necessary that Lange represent that his "connection", appellant, would be at the house the next day so that a potentially good customer, Alleva, would be satisfied with the product.

Appellant's reactions to the agent's comments ("you guys beat me once, you're not going to do it again") can only be understood in the context of a pre-existing business

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[9] While "scarcely 'overwhelming'" the Court states that this evidence was "sufficient to sustain the judgment on appeal". *United States* v. *Kaplan, supra,* 510 F.2d at 613.

[10] P. 6 of April 30, 1975 transcript.

relationship between Kaplan, Lange and Alleva in which appellant was the "connection".

Thus, the District Court's ruling was supported by sufficient proof, independent of Lange's declarations that appellant was connected with the illegal venture prior to the telephone conversation. See *Lutwak* v. *United States*, 334 U.S. 604 (1953); *United States* v. *Costello*, 352 F.2d 848, 855 (2d Cir. 1965), *rev'd on other grounds sub. nom. Marchetti* v. *United States*, 390 U.S. 39 (1968); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States* v. *D'Amato*, 493 F.2d 359, 363-364 (2d Cir. 1974); *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 39 U.S. 925 (1968); *United States* v. *Torres*, — F.2d — (2d Cir. Slip Op. 4573, 4576-79; decided July 2, 1975); *United States* v. *Wiley*, — F.2d — (2d Cir. Slip Op. 5211, 5214-5216; decided July 29, 1975).

POINT II

Appellant's Contention That The Trial Court Improperly Excluded His Hearsay Declarations Is Unsupported By The Record.

Appellant contends that the trial court committed error in refusing to permit Patricia Ruggiero, Lange's sister, to testify to appellant's conversation with her regarding his desire to secure employment for her brother. It is apparent that appellant sought to admit his testimony to show that his sole purpose in being at the Lange residence on January 6th was to make a telephone call on behalf of Lange.[11]

Mrs. Ruggiero was permitted to testify uninterrupted concerning the relationship between appellant and the Lange family, and that on the day in question,

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[11] Appellant testified at the first trial to his desire to secure employment for Lange and the telephone call he made on Lange's behalf. He did not testify at the second trial.

> "he told my brother he could get him a job, you know, in carpeting and he was telling like he was always telling my brother"—(122)

Although the government objected to the foregoing, the Court did not strike this testimony or render it inadmissible. Colloquy which ensued at the sidebar concerned the purpose for which this conversation might be admissible. At no time did defense counsel make an offer of proof as to any further conversation. Thus, it is evident that no adverse ruling arose from the testimony or colloquy. Thus, Mrs. Ruggiero's testimony as to the alleged purpose for appellant's visit, obtaining employment for her brother in the carpeting business, was allowed to stand.

Appellant contends, quoting testimony from the first trial, that the trial court improperly excluded the conversation between Mrs. Ruggiero and appellant wherein appellant states that he would make a phone call for Lange to obtain the employment.[12] However, no indication of such proffered testimony exists in the colloquy with Judge Judd in the instant case.

Appellant's argument erroneously implies, as well, that the testimony regarding the telephone call was withdrawn

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[12] Such testimony, even if offered to the Court at trial, was properly excluded as hearsay. The argument that such statements were offered to show his "purpose" in being at the Lange residence (state of mind to prove subsequent acts) is hardly impressive in view of this Court's decision in *Kaplan I*, in that appellant's "intention" to make a phone call on behalf of Lange bore only a remote artificial relationship to the legal and factual issues in the case, 510 F.2d at 611. It was not disputed that appellant was an old family friend, and in addition, that he was present in the room with Alleva and Lange. His making of the telephone call can only be deemed as superfluous to the issues in this case. Clearly, the trial court could have refused to admit such hearsay. See *United States* v. *Kennedy*, 291 F.2d 457, 459 (2d Cir. 1961); *Smith* v. *United States*, 385 F.2d 252, 254 (8th Cir. 19—); VI Wigmore, *Evidence*, Section 1732, p. 103 (3rd ed. 1940) and cases cited therein.

from the jury's consideration. However, the trial court permitted extensive hearsay testimony regarding conversations between Lange and his sister concerning the telephone call:

> A. My brother came to my room, asked me if they could sit in my room while Sammy made the phone call for my brother.
>
> Q. Did your brother tell you what that phone call was? A. Yes.
>
> Q. Would you tell the jury what the phone call was about? A. A phone call to get my brother a job (126).

If the jury suffered any illusion as to the purpose of the telephone call, it was quickly cured when Tobias Gold, a carpet installer, testified that he received a call from appellant on January 6th regarding a job for Lange.[13] In view of the fact that all the possible evidence concerning the telephone call was before the jury and defense counsel was hardly inhibited in arguing appellant's purpose in being present at the Lange house (176-180), no possible prejudice can be shown by appellant concerning any of Mrs. Ruggiero's testimony.

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[13] Q. I direct your attention to January of 1972, specifically January 6, 1972. Did you receive a phone call from Sam Kaplan on January 6, 1972? A. I don't really know exactly the date, but I got a phone call in my answering machine, a message from Sam Kaplan saying I should call him back, which I did that night, and he said, "Forget about it. I was going to ask you to give this Lange fellow a job again, but he got arrested today". That was it."

CONCLUSION

The judgment of conviction should be affirmed.

Dated: August 22, 1975

Respectfully submitted,

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Eastern District of New York.

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Assistant United States Attorneys,
of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of August 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.
522 Fifth Avenue
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
22nd day of August 19 75

Martha Scharf
MARTHA SCHARF
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 19 77